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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

05725.1226-00000

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Signature _____

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Application Number

10/619,612

Filed

July 16, 2003

First Named Inventor

Vincent De Laforcade

Art Unit

3732

Examiner

Robyn Kieu Doan

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

☐

applicant/inventor.

☐

assignee of record of the entire interest.

See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.

☒

attorney or agent of record.

Registration number 38,742☐

attorney or agent acting under 37 CFR 1.34.

Registration number if acting under 37 CFR 1.34 _____

SignatureAnthony M. Gutowski

Typed or printed name

571-203-2774

Telephone number

April 8, 2010

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☒*Total of 1 form is submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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EXPEDITED PROCEDURE REQUESTED

PATENT

Attorney Docket No. 05725.1226-00000

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: De Laforcade et al.) Group Art Unit: 3732
Application No.: 10/619,612)
Filed: July 16, 2003) Examiner: Robin Kieu Doan
For: APPLICATOR NOZZLE AND)
APPLICATOR ASSEMBLY) Confirmation No.: 6532
INCORPORATING SUCH A)
NOZZLE) **Mail Stop AF**
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PRE-APPEAL BRIEF REQUEST FOR REVIEW

In reply to the final Office Action mailed December 8, 2009, Applicants respectfully request panel review of the claim rejections. A Notice of Appeal is filed concurrently herewith, and a Pre-Appeal Brief Request for Review form accompanies this Request. This reply is due April 8, 2010, and is timely filed.

Claims 1, 3, 6, 9, 10, 12, 13, 16, 18-23, 39, 41, 44-48, 50, 52, 54, 56-62, 64, 65, 68, 69, 71, 72, 76, 78-83, and 111 are pending in this application, with claims 1, 39, and 62 being independent.

In the Office Action, claims 1, 6, 9, 10, 12, 13, 16, 18-23, 39, 44-48, 50, 52, 54, 56-62, 65, 68, 69, 71, 72, 76, 78-83, and 111 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Furusawa et al. (JP 2001/158464) ("Furusawa"). In addition, claims 3, 41, and 64 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Furusawa in view of Yuzuhara.

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Applicant respectfully submits that the Office Action fails to establish a prima facie case of obviousness at least because, as discussed in greater detail below, the cited art does not disclose or suggest all of the claimed features and because one of ordinary skill in the art would not have had any reason to modify the Furusawa reference in the manner suggested in the Office Action.

Furusawa fails to disclose or suggest all of the recited features of independent claims 1, 39, and 62. For example, as acknowledged at page 3 of the final Office Action, Furusawa fails to disclose or suggest an applicator nozzle having an arrangement of teeth disposed in a row including first and second end teeth, “wherein the first and second end teeth are the only teeth in the row devoid of any outlet aperture” (hereinafter referred to as “the two-tooth arrangement”), as recited in independent claims 1, 39, and 62. The Office Action acknowledges that Furusawa discloses four teeth devoid of any outlet aperture (hereinafter referred to as “the four-tooth arrangement”) instead of the claimed two-tooth arrangement. Final Office Action at 3.

Applicant respectfully submits that the final Office Action does not adequately support the assertions provided as rationale for modifying Furusawa. For example, the Office Action asserts that it “would have been an obvious matter of design choice . . . to construct two teeth . . . devoid of any outlet aperture . . . since such modification is [allegedly] old and [purportedly] provides the equivalent effect and function to the device” (*Id.*, emphasis added), but the Office Action does not provide any evidence supporting this allegation. Accordingly, the claim rejection relies on improper hindsight reasoning.

Moreover, Applicant respectfully submits that two-tooth and four-tooth arrangements are not equivalent in effect and function because the two-tooth arrangement provides benefits over the four-tooth arrangement. One such benefit is that the two-tooth arrangement enables easier

and more precise application of product to the hair. For example, in a comb-type applicator that has apertures facing in the direction of adjacent teeth, it may be more difficult during use to see exactly where the product is being applied on the hair. Therefore, it is beneficial to have a reference-point on the applicator that helps to position the applicator precisely on the hair. With a two-tooth arrangement, only one tooth at each end of the applicator is devoid of apertures. Thus, the end teeth (without apertures) define the width of the area where product will be applied. Accordingly, after applying product to a first area of hair with a first pass of the applicator, the applicator may be repositioned for a second pass in an area adjacent the first area such that an end tooth is at the edge of the first area to which the product has been applied with the first pass. This may be relatively easy to accomplish because only the outermost tooth may be positioned at the edge of the first area.

In contrast, in a four-tooth arrangement, two teeth at each end of the comb are provided without apertures. Therefore, it is not the outermost teeth, but the teeth second from each end that define the width of the area where product will be applied. Applying product using a comb having a four-tooth arrangement is less intuitive and somewhat more difficult than with an applicator having a two-tooth arrangement because with a four-tooth arrangement, the tooth that is second from the end must be positioned at the edge of the area in which product was previously applied. That is, the comb must overlap the area in which product was previously applied. Further, visualizing the second tooth from the end is somewhat more difficult than visualizing the location of the outermost tooth of a comb, particularly when viewed from certain angles. For at least these reasons, Applicant respectfully submits that, contrary to the assertions in the Office Action, the four-tooth arrangement of Furusawa is not equivalent to the two-tooth arrangement in effect or function.

In the Response to Arguments section, the final Office Action states that “[i]n response to applicant’s argument that the two tooth arrangement provides benefits over the four tooth arrangement [the Examiner notes that] there is no evidence of the criticality of the claimed two tooth arrangement; therefore, it would have been obvious . . . to construct [the Furusawa comb] with . . . two teeth . . . devoid of any outlet aperture instead of four teeth.” Final Office Action at 4-5, (emphasis added).

Applicant respectfully submits that this allegation is not on point and ignores Applicant’s explanation of the significance of the claimed features at issue. First, the Examiner has attempted to improperly shift the burden to Applicant without first setting forth any proper rationale for the obviousness allegation or otherwise establishing any prima facie case of obviousness. Indeed, the Examiner’s unsupported allegation about evidence of criticality fails to support the Examiner’s conclusory allegation of obviousness. Second, Applicant’s explanation, recounted above, of the benefits of the two tooth arrangement over the four tooth arrangement, in fact, shows the criticality/significance of this feature. Therefore, even if criticality were a requirement for non-obviousness of such a claim feature (a notion which Applicant does not concede), Applicant respectfully submits that Applicant has provided an explanation of the criticality that satisfies any such purported requirement.

For at least the foregoing reasons, Applicant respectfully submits that the cited art fails to disclose or suggest an applicator nozzle having all the recited features, including, for example, “first and second end teeth [that] are the only teeth in the row devoid of any outlet aperture,” as recited in independent claims 1, 39, and 62, and that the final Office Action does not provide any rationale for modifying Furusawa that is sufficient to establish a prima facie case of obviousness.

Therefore, Applicant respectfully submits that the § 103(a) rejection of independent claims 1, 39, and 62 should be withdrawn.

In addition, each of dependent claims 3, 6, 9, 10, 12, 13, 16, 18-23, 41, 44-48, 50, 52, 54, 56-61, 64, 65, 68, 69, 71, 72, 76, 78-83, 111, and 112 depends from one of independent claims 1, 39, and 62. Accordingly, each of these dependent claims is allowable for at least the same reasons as the independent claim from which it respectively depends.

Please grant any additional extensions of time required to enter this Request and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: April 8, 2010

By: 
Jeremy T. Thissell (Reg. No. 56,065)